MOHD SALLEH KASIM

v.

TAISHO MARINE & FIRE INSURANCE CO LTD & ANOR

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-134-1990]
6 OCTOBER 1998

ROAD TRAFFIC: *Insurance - Judgment against insured by plaintiff/third party - Whether 1st defendant was liable to satisfy judgment - Whether 1st defendant was insurer at the time of accident - Whether motorcycle was ridden without insured's permission - Whether there was a transfer of ownership of motorcycle without 1st defendant's knowledge and consent*

EVIDENCE: *Burden of proof - Allegation of fraud by 1st defendant - Onus - Upon whom - Standard of proof - Whether on a balance of probabilities or beyond reasonable doubt*

ROAD TRAFFIC: *Insurance - Judgment against insured by plaintiff/third party - Whether Motor Insurers' Bureau was liable to settle judgment - Whether pre-conditions for liability were satisfied - Memorandum of Agreement, cl. 6(a) & (b) - Whether plaintiff should have appealed to Minister by virtue of cl. (d) of Memorandum of Agreement instead of filing instant action*

ROAD TRAFFIC: *Insurance - Claim by third party - Whether an exception to the doctrine of privity of contract - Road Traffic Ordinance 1958, s. 80 - Whether Motor Insurers' Bureau gives third party a direct cause of action*

The plaintiff, the pillion rider of a motorcycle, was involved in a collision with another motorcycle ('the motorcycle') ridden by the authorised rider of the insured of the motorcycle. The plaintiff obtained judgment against the rider of the motorcycle and the insured in the lower court. In this instance, the plaintiff sought to enforce the said judgment against the insurer, the 1st defendant, and/or the Motor Insurers' Bureau of West Malaysia ('the Bureau').

The 1st defendant alleged that the rider of the motorcycle was not the authorised rider of the vehicle concerned and that there had been a transfer of ownership without its knowledge or consent. It was also alleged that there was fraud on the part of the plaintiff. The Bureau, on the other hand, alleged that it was not liable as the plaintiff had not complied with cl. 6 of its

Memorandum of Agreement ('the memorandum'). Further, it was alleged that the plaintiff's action was misconceived as he should have appealed to the Minister concerned if he was dissatisfied with the Bureau's decision.

Held:

[1] The Registry of Vehicles in Singapore ('ROV') confirmed that on the date of the accident, the motorcycle was owned by the insured with the 1st defendant as the insurer. The court took judicial notice of the fact that the ROV, like the RIMV here, are efficient reliable keepers of the records of motor vehicles.

[2] It was wrong to submit that the rider of the motorcycle had ridden it without the permission of the owner. From the statement of agreed facts, the insured was the registered owner of the motorcycle and he must have given his permission to the rider to ride the motorcycle on the day of the accident. This presumption should be drawn in favour of the plaintiff based on the case of *Kayay & Anor v. Lim Yew Seng*.

[3] The 1st defendant failed to discharge their burden of proof to show, firstly, that they had never issued a policy of insurance to the insured and, secondly, that there was a transfer of ownership of the motorcycle without their knowledge or consent.

[4] In the event there was a transfer of ownership of the motorcycle, the 1st defendant was still liable to the plaintiff for the simple reason that under the memorandum, to which the 1st defendant was a signatory, the 1st defendant had agreed to be liable to third parties for any claims arising out of a road accident after 30 August 1984 involving any vehicle insured by it even though the vehicle may have been transferred from their insured to some other person.

[5] As fraud was alleged by the 1st defendant, the onus was on it to prove fraud, not on a balance of probabilities but beyond reasonable doubt. The plaintiff was the injured victim and the authorised rider had lodged a police report admitting that he was the rider of the motorcycle. The 1st defendant had failed to locate the owner or the insured in order to call them as witnesses. These set of facts did not establish fraud on the part of the plaintiff.

[6] By cl. 6(a) of the memorandum, a written notice of the proceedings must be given by registered post before the commencement of the proceedings to the insurer and the Bureau. By cl. 6(b) of the memorandum, a copy of the summons must also be issued and supplied to the insurer or the Bureau. In so far as the case against the 1st defendant was concerned,

the plaintiff had complied fully with cl. 6 of the memorandum. However, the same could not be said in regard to the Bureau. There was no evidence emanating from the plaintiff that the notice and the summons had been given and supplied to the Bureau.

[7] Clause 6(d) of the memorandum states, *inter alia*, that the plaintiff shall comply with all the requirements of the Bureau and that if the requirements were unreasonable, the plaintiff should appeal to the Minister concerned. The plaintiff had not appealed to the Minister as the Bureau had not imposed any requirements for the plaintiff to comply with in the first place. It merely advised the plaintiff that the insurer, the 1st defendant, was liable and not the Bureau. As such, there were no requirements imposed by the Bureau on the plaintiff to enable him to appeal to the Minister.

[8] By virtue of s. 80 of the then Road Transport Ordinance 1958, an exception was made to the doctrine of privity of contract which enabled a third party to a contract to sue on it even though he was not a party to it. Further, it is very clear from the memorandum, that its primary object is to give a third party who comes within its purview, a direct cause of action.

[9] The Bureau must step in by virtue of the memorandum to pay victims of road accidents whenever the victims cannot recover from insurance companies. Road accident victims who have obtained judgments and who seek to enforce those judgments must comply fully with cl. 6 of the memorandum before the Bureau can make payments to them. In such a situation, the Bureau is obliged to pay those victims in respect of any liability for injury or death, arising out of the situation which gives rise to the claim against it.

[Judgment against 1st defendant granted but against Bureau dismissed.]

Cases referred to:
Auckland City Council v. Hapimana [1976] 1 NZLR 731 ***(refd)***
Baldwin and Francis Ltd v. Patent Appeal Tribunal [1959] AC 663 ***(refd)***
Hardy v. Motor Insurers' Bureau [1964] 2 QB 745 ***(refd)***
Holland v. Johns [1917] 23 CLR 149 ***(refd)***
Ingram v. Percival [1969] 1 QB 548 ***(refd)***
Kayat & Anor v. Lim Yew Seng [1972] 1 MLJ 26 ***(foll)***
Kent v. Stamps [1982] RTR 273 ***(refd)***
McQuaker v. Goddard [1940] 1 KB 687 ***(refd)***
Narayanan v. Official Assignee, Rangoon AIR [1941] PC 93 ***(refd)***
New India Assurance Co Ltd v. Simirah [1966] 2 MLJ 1 ***(refd)***

Paul v. DPP [1990] 90 Cr App Rep 173 ***(refd)***
Persson v. London Country Buses [1974] 1 WLR 569 ***(refd)***
Peters v. General Accident & Life Assurance Corpn., Ltd [1937] 4 All ER 628 ***(refd)***
Randall v. Motor Insurers' Bureau [1968] 1 WLR 1900 ***(refd)***
R v. Field JJ, ex parte White [1895] 64 LJMC 158 ***(refd)***
Saminathan v. Pappa [1981] 1 MLJ 121 ***(refd)***

Legislation referred to:
Road Traffic Ordinance 1958, ss. 74, (1), 75, (4), 80
Road Traffic Act 1934 [UK], s. 10

For the plaintiff - N Jegatheson; M/s John Ang & Jega
For the 1st defendant - Roha Mohamad Yusof; M/s Tok & Co
For the 2nd defendant - Sagadaven Thangavelu; M/s Shearn Delamore & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

The plaintiff is an accident victim and he seeks to enforce his judgment. The first defendant, Taisho Marine & Fire Insurance Co Ltd ('Taisho'), is a foreign limited company having its registered office in the Republic of Singapore. The second defendant, Motor Insurers' Bureau of West Malaysia ('Bureau'), is a company limited by guarantee and having its registered office in Kuala Lumpur. Taisho is said to be the authorised insurer within the definition of s. 75 of the then Road Traffic Ordinance 1958 ('RTO') or held itself out as such insurer and in consideration of a premium paid by one Ding Bik Lee ('Ding') issued a policy of insurance whereby Taisho agreed to insure Ding and/or any person driving on the order or with the permission of Ding in respect of any liability which might be incurred by Ding or that authorised driver in respect of any death or bodily injury to any person caused by or arising out of the use on the road in West Malaysia of motorcycle AY 7181 X of which Ding was the registered owner being such a liability in respect of third party risks as required to be covered by a policy of insurance under sub-s. (1) of s. 74 of the RTO. Taisho, in pursuance of the provisions of sub-s. 4 of s. 75 of the RTO, delivered to Ding in respect of the policy a certificate of insurance. Sometime on 11 September 1984 during the currency of the said policy and whilst the insurance was in full force there occurred an accident whilst the plaintiff was riding as pillion on motorcycle JAT 7499 ridden by Zainal bin Abdul Aziz ('Zainal') and travelling along Jalan Scudai from Tampoi in the direction of Johor Bahru, when at or near the third milestone in the district of Johor Bahru he was involved in a collision with motorcycle

AY 7181 X ridden by Michel Tene Jean as the agent or with the permission of Ding, the insured. These were some of the facts as extracted from the statement of claim.

The parties have been very magnanimous. In bundle "D", they compromised and prepared the statement of agreed facts. Couched in simple language, the statement of agreed facts read as follows:

(1) Accident occurred on September 11, 1984 involving the plaintiff who was riding pillion on motorcycle JAT 7499 and motorcycle AY 7181 X ridden by Michel Tene Jean, a Frenchman.

(2) The notice of commencement of the proceedings was issued to Taisho on January 8, 1987 while the summons was issued on January 13, 1987.

(3) The registered owner of motorcycle AY 7181 X as per the Registry of Vehicles, Singapore is Ding and the insurer concerned is Taisho.

(4) By letter dated January 8, 1985, Taisho confirmed that they are the insurers of motorcycle AY 7181 X and on April 15, 1986 the solicitors for Taisho offered RM8,000.00 as damages and costs of RM1,000.00. The offer was outrightly rejected by the solicitors for the plaintiff.

(5) By letter dated April 26, 1988, the solicitors for Taisho informed the solicitors for the plaintiff that the owner of motorcycle AY 7181 X was not known to them. The policy issued by Taisho is in the name of Tan Cheng Chuan.

(6) On January 25, 1988, an interlocutory judgment was entered against the rider (Michel Tene Jean) and the registered owner of motorcycle AY 7181 X (Ding). On January 3, 1989, damages were assessed.

(7) By letter dated September 13, 1989, the solicitors for the plaintiff notified the Motor Insurers' Bureau of Singapore of the judgment obtained by the plaintiff and the same information was also relayed by telex dated September 21, 1989. In due course the Motor Insurers' Bureau of Singapore requested the solicitors for the plaintiff to refer the claim to the Motor Insurers' Bureau of West Malaysia.

(8) On September 29, 1989 the solicitors for the plaintiff notified the Motor Insurers' Bureau of West Malaysia of the plaintiff's claim.

(9) By letters dated October 5, 1989 and June 28, 1990, the Motor Insurers' Bureau of West Malaysia indicated that they are not liable to satisfy the judgment.

(10) The issue for determination is whether Taisho or the Bureau (referring to the Motor Insurers' Bureau of West Malaysia) or both of them are liable to satisfy the judgment.

It is germane to mention that sometime on 9 January 1987, the plaintiff through his solicitors Messrs John Ang & Jega commenced an action in the Sessions Court, Johor Bahru *vide* summons no: 63-16 of 1987 against Michel Tene Jean and Ding to recover damages in respect of bodily injuries and consequential loss being such a liability as was covered by the terms of the insurance policy. The summons was subsequently transferred to the Magistrate's Court at Johor Bahru in accordance with the practice direction. Since Taisho or their solicitors were not prepared to accept service of the summons, the plaintiff took the necessary steps and had it served by way of substituted service. On 25 January 1988 as there was no appearance nor defence filed and in the absence of the defendants in summons no: 63-16 of 1987, the Magistrate's Court ordered that an interlocutory judgment in default of appearance be entered and it was further ordered that the matter be fixed for assessment of damages on 23 February 1988. That assessment of damages came up for hearing on six occasions and finally on 3 January 1989 after hearing evidence adduced by the plaintiff the Magistrate's Court ordered the defendants in summons no: 63-16 of 1987 to pay a sum of RM19,609 inclusive of interest to the date of judgment and costs and further interest on the judgment sum at the rate of 8% per annum from the date of judgment to the date of payment or realisation.

The plaintiff testified and his testimony was short and swift and there were no cross-examinations by both the defendants' counsels. The plaintiff testified as to the accident, the judgment which he obtained from the Magistrate's Court and the refusal of the insurance company to satisfy that judgment.

Now, before me it was the plaintiff's stand that by reason of the provisions of s. 80 of the RTO, Taisho was said to be liable to pay the plaintiff the sum of RM19,609 plus further interest. Alternatively, it was the plaintiff's stand that the Bureau should be liable to pay to the plaintiff that judgment sum by reason of cl. 2 of the memorandum of agreement made between the Motor Insurers' Bureau of West Malaysia and each of those insurance companies and Lloyd's Underwriters transacting compulsory motor vehicle insurance business in West Malaysia. The memorandum of agreement also adverted to an agreement dated 15 January 1968 between the Bureau and the Government of Malaysia. The members of the Bureau comprised of not more than 150 members and Taisho was one of them. It would not be complete if this judgment do not take into account certain clauses in the memorandum of agreement as these clauses are germane and would assist the court in understanding the Bureau better. I will now undertake that exercise. Clause 1 of the memorandum of agreement defines "Insurer" to mean "any Insurance Company or Lloyd's Underwriter who is or may become a party to this

agreement. Clause 1 of the memorandum of agreement defines "Insurance" to mean an "insurance against liability required to be insured by the compulsory insurance legislation effected by or under a policy of insurance, a cover note, correspondence, or any other means, whether or not a certificate of insurance as required by the compulsory insurance legislation has been issued or delivered." The phrase "judgment debtor" has been defined in cl. 1 of the memorandum of agreement to mean "a person against whom judgment has been obtained in a court of competent jurisdiction in West Malaysia in respect of a liability required to be insured by the compulsory insurance legislation." An "original judgment creditor" has been defined under cl. 1 of the memorandum of agreement to mean "the person or persons in whose favour such judgment was given and who is or are entitled to enforce it and has or have complied or is or are able and willing to comply with the conditions set out in cl. 6 of the annexed agreement." The phrase "satisfy the original judgment creditor" has been defined in cl. 1 of the memorandum of agreement to mean "pay or cause to be paid to the original judgment creditor such sum as is due and outstanding under the judgment in respect of a liability required to be insured by the compulsory insurance legislation (including taxed costs or such proportion of the taxed costs as is attributable to such liability) on terms that the judgment is ceded or assigned by the original judgment creditor to the insurer making the payment." The meaning to the phrase "insured concerned" in cl. 1 of the memorandum of agreement has been defined to mean "the insurer who at the time of the accident gave rise to a liability required to be insured by the compulsory insurance legislation was providing an insurance against such liability in respect of the vehicle arising out of the use of which the liability of the judgment debtor was incurred. An insurer is concerned within the meaning of this agreement notwithstanding that –

(i) the insurance was arranged after the accident but purported to be effective at the time of the accident; or

(ii) the insurance has been obtained by fraud, misrepresentation, non disclosure of material facts or mistake; or

(iii) some term, description, limitation, exception or condition (whether express or implied) of the insurance or of the proposal form on which it is based expressly or by implication excludes the insurer's liability whether generally or in the particular circumstances in which the judgment debtor's liability was incurred; or

(iv) the judgment debtor was in unauthorised possession of the vehicle arising out of the use of which the liability of the judgment debtor was incurred

and only ceases so to be concerned –

(i) when the insurance has been cancelled before the date on which the liability required to be insured by the compulsory insurance legislation was incurred by agreement of the parties to the insurance or under a power of cancellation contained therein;

(ii) when the insurance has ceased to operate by reason of a transfer of interest in the vehicle which the insurance purports to cover;

(iii) when before the date on which the liability required to be insured by the compulsory insurance legislation was incurred the insurer has obtained a declaration from a court of competent jurisdiction that the insurance is void or unenforceable;

(iv) in any other case, from the date on which the insurance by its terms lapsed.

Provided always that for the purpose of this agreement an insurer being an insurer concerned in respect of a Motor Trade Road Risk Policy covering unspecified vehicles shall in relation to such vehicles and irrespective of the basis of the policy be the insurer concerned.

(1) in respect of vehicles not the property of the insured if and only if the vehicle in respect of which the claim arises was in the custody or control of the insured or was only removed from that custody or control without the authority of the insured;

(2) in respect of vehicles which are the property of the insured, at all times, except that such insurer shall not be the insurer concerned in respect of any vehicle specifically excluded from the cover of the policy by reference to its registration mark and number or specifically insured in the name of the motor trader with another insurer.

Where an insurer concerned under such a motor trade policy and an insurer concerned under a specified vehicle policy are both involved in circumstances in which neither insurer is liable under its policy any claim in respect of a liability required to be insured by the compulsory insurance legislation shall be handled by agreement between the Insurers Concerned each being liable for one half of the damages and costs.

Clause 2 of the memorandum of agreement reads as follows:

Where a visitor entering West Malaysia is insured or holds a Policy purporting to provide insurance against liability required to be insured by the Compulsory Insurance Legislation and such insurance has been issued outside West Malaysia by an Insurer, or a Subsidiary or Associated Company of an Insurer, such Insurer shall be the Insurer Concerned in the event of such visitor becoming a Judgment Debtor.

Clause 3 of the memorandum of agreement also reads as follows:

> (a) If a Judgment is obtained in West Malaysia against any person (hereinafter referred to as the "Judgment Debtor") in respect of liability required to be insured by the Compulsory Insurance Legislation the Insurer Concerned will satisfy the Original Judgment Creditor if and to the extent that the Judgment has not been satisfied by the Judgment Debtor within twenty-eight days from the date upon which the person in whose favour it was given is entitled to enforce it.
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> (b) Where judgment is obtained in respect of a liability which by reason only of a provision in Sub-Section (5) of Section 74 of the Road Traffic Ordinance 1958 is not required to be insured and there is in fact a policy purporting to cover the use of the vehicle giving rise to such liability the judgment shall for the purposes of this Agreement be deemed to be a judgment obtained in respect of a liability required to be insured by the Compulsory Insurance Legislation; and a vehicle referred to in the said Sub-Section (5) which has been unlawfully removed from the possession of the lawful owner or user shall be deemed to continue in that possession while it is so removed.

The memorandum of agreement certainly gave strength to the Bureau as the Bureau can now step in to compensate victims of road accidents with the intervention of the courts, of course.

It cannot be denied and it was never denied that the plaintiff had obtained judgment against Michel Tene Jean and Ding before the Magistrate's Court on 25 January 1988. The plaintiff is now seeking to enforce that judgment against Taisho and the Bureau. Three different searches with the Registry of Vehicles in Singapore ('ROV') to ascertain the registered ownership of motorcycle AY 7181 X on 11 September 1984 positively showed Ding to be the owner and Taisho, on the material date, to be the insurer. Yet, Taisho through their solicitors by letter dated 26 April 1988 claimed that the owner of motorcycle AY 7181 X - namely, Ding, was not known to them and they alleged that they had issued a policy of insurance in the name of Tan Cheng Chuan ('Tan'). It was a stand adopted by Taisho solely to avoid paying that judgment which the plaintiff sought to enforce. Surprisingly, three years three months and eighteen days ago, Taisho admitted by letter dated 8 January 1985 that they were the insurers of motorcycle AY 7181 X and through their solicitors Messrs Choo & Yap of Singapore, Taisho negotiated with the plaintiff's solicitors to settle the plaintiff's claim. When that negotiation fell through, the plaintiff then gave notice to Taisho of the commencement of proceedings on 8 January 1987 and in due course filed the proceedings. No evidence was led to show how motorcycle AY 7181 X had changed ownership from Tan to Ding. But what was certain was that the rider of the motorcycle

AY 7181 X at the material time was that Frenchman, Michel Tene Jean. It was obvious that Taisho was trying to avoid satisfying the judgment which the plaintiff had legally obtained. Taisho seemed to rely on the case of *New India Assurance Co Ltd v. Simirah* [1966] 2 MLJ 1, a decision of the then Federal Court, in order to wriggle their way out of their current predicament. The facts in that case may be stated as follows. The respondent there had obtained judgment for damages against one Chong Swee Peow, the driver of a motorcar, arising from the death of her husband who had been knocked down and killed by the motor car. She sought to enforce the judgment against the insurance company. The defence was that the car was insured in the name of one Chua Hock Lee and that the latter had sold the car to Chong Swee Peow, the driver of the motorcar. Although Chua Hock Lee had handed the insurance documents to Chong Swee Peow this, it was contended, did not amount to an assignment of the benefit of the insurance policy. At the trial, the learned judge held that the property in the car had not passed from Chua Hock Lee and he gave judgment for the respondent. On appeal, the then Federal Court held that on the evidence the ownership of the motorcar had passed to Chong Swee Peow and therefore the insurers were not liable to satisfy the judgment. Thomson LP delivering a separate judgment had this to say at pp. 3 to 4 of the report:

> The insurers resisted the claim against them on the ground that prior to the date of the accident Chua Hock Lee had sold the car and delivered it to Chong Swee Peow and that although Chua had handed the insurance documents to Chong this did not amount to an assignment of the benefit of the policy of insurance issued to Chua in respect of the car. Accordingly they were not liable under the policy. If Chua had indeed ceased to be the owner of the car then that was a good defence (see *Peters v. General Accident, Fire & Life Assurance Corporation, Ltd.* [1937], 54 T.L.R. 202) and accordingly the only issue at the trial was whether at the material date, that is 4th February, 1960, Chua had ceased to be the owner.
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> In the event the trial judge decided that the property in the car had not passed from Chua as averred and judgment was accordingly entered for the plaintiff. Against that decision the insurers have now appealed.
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> I have had the benefit of reading the judgment that has just been delivered by Ong FJ, I agree with his course of reasoning and I agree with the results to which that course of reasoning has compelled him, that is to say that ownership of the car SC 7044 had at the time of the accident passed to Chong and accordingly that the present appeal must be allowed. In the circumstances it would be otiose to repeat in my own words what has been said by him.
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> The case, however, is one of a class which is becoming frequent in the courts where an insurer resists claims made against him under s. 80(1) of the Road

Traffic Ordinance on technical legal grounds arising out of the terms of the relevant insurance policy and I feel I should make certain observations.

In the present case the unsuccessful respondent is the young widow of a rubber tapper with three very young children whose husband has been killed by what a judge has held to be the negligent driving of a motor vehicle. The killer, the driver of the vehicle, is a man of straw wholly unable to pay for the harm he has done. By reason of the law relating to the contract of insurance he was not covered by insurance as required by law, though, to do him justice, he had reason to believe he was so covered because he knew there was an insurance policy in force covering the car and he believed, not unnaturally but as it turned out wrongly, that by reason of the delivery of the insurance documents to himself the car was covered while he was driving it. Indeed if he had been driving it while it was still the property of the former owner, as for instance he had been driving it with a view to deciding whether he should buy it, it would have been covered while under his control.

And now this widow and these three young children have to face the future deprived of their husband, father and breadwinner without compensation for his loss and indeed faced with a great burden of debt by reason of the costs of these proceedings.

Things like this should not happen in a civilised society. It may be legal justice, it is not social justice.

Factually, the case of *New India Assurance Co. Ltd v. Simirah [supra]* can readily be distinguished. There, there was no evidence emanating from the office of the registrar and Inspector of Motor Vehicles ('RIMV') to show who was the registered owner and who was the insurer at the material time of the accident. Here, the ROV confirmed that on the date of the accident motorcycle AY 7181 X was owned by Ding with Taisho as the insurer. Incidentally, I am constrained to take judicial notice that the ROV just like our RIMV are efficient and reliable keepers of the records of motor vehicles. It is not difficult for a judge to take judicial notice of a fact when the subject of judicial notice is a matter of common knowledge with regard to which no inquiry is made by the judge. In such a situation the judge is certainly acting on his own knowledge. As Lord Denning once said in *Baldwin and Francis Ltd v. Patent Appeal Tribunal* [1959] AC 663 at 691:

The court must possess itself of necessary information. Some judges may have it already because of their previous experience. Others may have to acquire it for the first time, but in either case the information they glean is not evidence strictly so-called. When an assessor explains the technicalities, he does not do it on oath, nor can he be cross-examined, and no one ever called the author of a dictionary to give evidence. All that happens is that the court is equipping itself for its task by taking judicial notice of all such things as it ought to know in order to do its work properly.

McQuaker v. Goddard [1940] 1 KB 687, [1940] 1 All ER 471 is a classical case where the trial judge listened to witnesses and consulted books and then decided to take judicial notice of a fact. In that case the trial judge held that, in the absence of any evidence of scienter, those in control of a zoo had no case to answer when a claim for personal injuries was made in respect of a bite from a camel because camels are mansuetae naturae. The trial judge reached this conclusion after consulting books about camels and hearing witnesses, some of which spoke of the wild habits of camels but the majority of the experts deposed as to the tameness of these animals. The trial judge's decision was affirmed by the Court of Appeal. Clauson LJ remarked that when the trial judge heard the witnesses he was not taking evidence in the ordinary sense. Clauson LJ was of the view that the witnesses were assisting the trial judge in "forming his view as to what the ordinary course of nature in this regard in fact is, a matter of which he is supposed to have complete knowledge".

Examples of judicial notice are abound. Only one needs to be highlighted and cited. Thus, a judicial notice that the seal or signature on a document is that of a particular court or official merely means that the seal or signature is recognised as similar to that of the court or official, and, consequently, evidence of forgery in any given case, though plainly admissible, does not rebut the fact of which the judicial notice is taken (*Holland v. Johns* [1917] 23 CLR 149 at 154). One must not forget that when taking judicial notice a judge frequently makes use of his general knowledge, and justices can certainly make use of their knowledge of local conditions (*Ingram v. Percival* [1969] 1 QB 548, [1968] 3 All ER 657 (extent of tidal wave)); *Kent v. Stamps* [1982] RTR 273 (topography of road); and *Paul v. DPP* [1990] 90 Cr. App. Rep 173 (residential character of an area). In *R v. Field JJ, ex parte White* [1895] 64 LJMC 158, the court had to deal with the wholesome issue of whether cocoa must necessarily contain a quantity of foreign ingredients. It was certainly not a matter of general notoriety or even something which can be put beyond dispute by reference to the appropriate sources of information. But some of the judges had acquired knowledge of the subject in the navy, and the Divisional Court did not dispute the propriety of those justices from making use of that acquired knowledge. Wills J, whose hobby was mountain climbing, said:

> In the nature of things, no one in determining a case of this kind, can discard his own particular knowledge of a subject of this kind. I might as well be asked to decide a question as to the sufficiency of an alpine rope without bringing my personal knowledge into play.

In my judgment, the doctrine of judicial notice is here to stay. It certainly expedites the hearing of many cases. It is a correct statement of the law to

say that the basic essential is the requirement that the fact judicially noticed should be of a class that is generally known as to give rise to the presumption that all persons, be they high or low, are aware of it (*Holland v. Jones* [1917] 23 CLR 149 at 153, per Isaacs CJ; and *Auckland City Council v. Hapimana* [1976] 1 NZLR 731). Having studied in the then University of Singapore, I have some knowledge of the efficiency of the ROV and I am entitled to apply that knowledge, albeit acquired, to the factual matrix of the present case.

The existence of the Bureau in Malaysia is greatly applauded. It is an avenue for an innocent victim of a road accident to obtain compensation in the event the wrongdoer is not insured or for that matter the wrongdoer is a man of straw. Thomson LP had envisaged the future and had called for the setting-up of the Bureau in the case of *New India Assurance Co. Ltd v. Simirah [supra]* in these words (at p. 4 of the report):

> Hitherto, in this country as elsewhere, the State has recognised to some extent the unfortunate position of victims of road accidents by the requirement of compulsory third party insurance. Experience, however, has shown that that is not enough and that there are cases like the present where by reason of legal technicalities an innocent victim fails to obtain any compensation.
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> I express the prophecy that sooner or later we shall have to accept the position that compensation for injuries resulting from road accidents should become the subject of some form of social insurance and should not be left to depend on the vagaries of application of the general law relating to negligence.
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> In the meantime, however, in the United Kingdom insurance companies have recognised the existence on their part of some sort of social duty in the matter by setting up the Motor Insurers Bureau which in cases like the present one will, subject to the fulfilment of certain simple conditions by way of safeguard, pay compensation. The time has long passed when insurance companies in this country should follow this example and I would express the view that if they are not prepared to do so voluntarily pressure should be put upon them to do so by Government.

The issues hotly debated between the parties can be crystallised in these words:

(1) Was Taisho liable to settle the judgment obtained by the plaintiff against Michel Tene Jean and Ding under (a) the policy of insurance issued by Taisho in respect of motorcycle AY 7181 X or (b) by virtue of the memorandum of agreement (commonly called as the MIB agreement) to which Taisho was a signatory thereto?

(2) If Taisho was not liable under the policy of insurance issued by it as well as under the memorandum of agreement, then the question to pose would be: Whether the Bureau was liable to settle the plaintiff's claim?

(3) Was the plaintiff's claim fraudulent? And if the answer was in the positive should it be dismissed? The defence of fraud as raised by Taisho was based on the following:

(a) The failure of the plaintiff to claim for his misfortune, so to speak, against Zainal – the rider of motorcycle JAT 7499;

(b) The plaintiff did not know the insurance particulars of motorcycle JAT 7499 ridden by Zainal or the particulars of Zainal's solicitors for that matter;

(c) That the plaintiff had refused to disclose the whereabouts of Zainal.

I will now proceed to examine the following issues.

Was There A Valid Policy Of Insurance Issued By Taisho In Respect Of Motorcycle AY 7181 X At The Time Of The Accident In Favour Of Ding?

As I said the three searches with the ROV showed, at the material time, that motorcycle AY 7181 X was registered in the name of Ding and that Taisho was the insurer. All these were also incorporated in the statement of agreed facts. Yet, Taisho had the audacity to deny that they were the insurers. Taisho relied on bundle "C" of pp. 4 and 5, which was a proposal form signed by Tan of 68 Rangoon Road, Singapore 0821, a company director. The schedule to the insurance policy issued to Tan described him as a company director. But, surprisingly Tan was not called to give evidence nor was a statutory declaration obtained from him to show that there was a transfer of ownership of motorcycle AY 7181 X from Tan to Ding. It must be emphasised that Ding too was not called to give evidence and no statutory declaration was secured from Ding to show the transfer of ownership of motorcycle AY 7181 X from Tan to Ding. In fact, no evidence was forthcoming to explain their absence in court. There was also no oral evidence emanating from Taisho to deny that they did in fact issue the policy of insurance to Ding. The case of *Peters v. General Accident & Life Assurance Corpn., Ltd* [1937] 4 All ER 628 was relied upon by Madam Roha Mohamad Yusof, learned counsel for Taisho, to drive home the point that Michel Tene Jean rode motorcycle AY 7181 X without the permission of Tan. She argued that motorcycle AY 7181 X was first owned by Tan who then transferred it to Ding. With respect, this submission failed to take into account the lack of evidence pertaining to the sale of motorcycle AY 7181 X from Tan to Ding. This submission too conveniently overlooked the statement of agreed facts between the parties which clearly established that, at the material time, motorcycle AY 7181 X was registered in the name of Ding with Taisho as its insurer. It was plainly wrong to submit that Michel Tene Jean rode motorcycle AY 7181 X without the permission of Tan as the latter was not called to the stand to testify. From

the statement of the agreed facts, Ding was the registered owner of motorcycle AY 7181 X and he must have given his permission to Michel Tene Jean to ride that motorcycle on that eventful day. This presumption should be drawn in favour of the plaintiff on the strength of *Kayat & Anor v. Lim Yew Seng* [1972] 1 MLJ 26 where Syed Othman J said at p. 27 of the report:

> In determining the question which party has the burden of proof on the issue whether the driver of the car was the servant or agent of the owner, I need cite only two authorities.
>
> In *Barnard v. Sully* [1931] 47 T.L.R. 557, Mr. Barnard sued Mr. Sully in the county court for damage done to his van through the negligent driving of Mr. Sully's car. It seems to have been accepted that Mr. Sully was not driving himself, and he denied that the driver was his servant or agent. In the absence of evidence contradicting this denial the county court judge withdrew the case from the jury. Mr. Barnard appealed to a Divisional Court of the King's Bench, but Mr. Sully did not appear and was not represented. Allowing the appeal Scrutton L.J., with whom Greer and Slesser L.JJ. concurred, said :
>
> > No doubt, sometimes motor-cars were being driven by persons who were not the owners, nor the servants or agents of the owners ... But apart from authority, the more usual fact was that a motor-car was driven by the owner or the servant or agent of the owner, and therefore the fact of ownership was some evidence fit to go to the jury that at the material time the motor-car was being driven by the owner of it or by his servant or agent. But it was evidence which was liable to be rebutted by proof of the actual facts.
>
> In *Rambarran v. Gurrucharran, supra*, Lord Donovan after quoting the above passage said at page 751:
>
> > Where no more is known of the facts, therefore, than that at the time of an accident the car was owned but not driven by A it can be said that A's ownership affords some evidence that it was being driven by his servant or agent.

From these authorities it is clear that where a car is driven by a person other than the owner, the presumption is raised that the driver of the car is the servant or agent of the owner. I think the rule is so laid down because in the course of human conduct whether or not the driver is the servant or agent of the owner or whether or not there is connection between the driver and the owner should be within the knowledge of the owner of the car. In the case here, it is admitted that the defendant was the owner of the car. The presumption is raised that the driver was his servant or agent. It is for the defendant to rebut the presumption by proof of the actual facts. Since he has chosen to remain silent, the irresistible conclusion is that the driver was his servant or agent. I therefore find the defendant liable.

Factually, the case of *Peters v. General Accident & Life Assurance Corpn., Ltd [supra]* are poles apart from the present case. There the purchaser of the motorcar was not covered by the insurance policy at the material time and the plaintiff who had obtained judgment against the purchaser for the injury sustained as a result of a road accident was not able to enforce the judgment against the insurance company. I now propose to narrate the facts in a more coherent way. In that case the vendor of a motorcar insured by the defendants handed over the insurance policy with the car to the purchaser.

The policy contained the usual clause extending the cover to any person driving with the consent or permission of the insured. The plaintiff, who had been injured by the car after the sale had been completed, obtained a judgment against the purchaser, and in the present action sought to recover the damages he had been awarded from the present defendants under the provisions of the Road Traffic Act 1934, s. 10 thereof. The court rightly held that when the vendor sold the car, the insurance policy automatically lapsed. The court too held that at the time of the accident, the purchaser could not be said to be driving the car by the order or with the permission of the vendor, as the car was then the purchaser's own property. The court further held that the insured is not entitled to assign his policy to a third party. An insurance policy is said to be a contract of personal indemnity, and the insurers cannot be compelled to accept responsibility in respect of a third party who may be quite unknown to them.

In my judgment, Ding was the registered owner of motorcycle AY 7181 X at the material time and Taisho too was the insurer. It was also my judgment that Michel Tene Jean rode motorcycle AY 7181 X at the material time as the agent or with the permission of Ding, the insured. I too hold and it was my judgment that Taisho failed to discharge their burden of proof to show, firstly, that they had never issued a policy of insurance to Ding and, secondly, that Tan had transferred motorcycle AY 7181 X to Ding without their knowledge or consent.

What If There Had Been A Transfer Of Ownership Of Motorcycle AY 7181 X From Tan To Ding?

Lest I be accused of an oversight, I must now consider this crucial question. In the event there was a transfer of ownership of that motorcycle from Tan to Ding, Taisho was still liable to the plaintiff for the simple reason that under the memorandum of agreement of which Taisho was the signatory, Taisho had agreed to be liable to third parties for any claims arising out of a road accident after 30 August 1984 involving any vehicle insured by them even though the vehicle may have been transferred from their insured to some other person.

I will now reproduce a letter dated 18 January 1985 emanating from the Bureau which would clearly pin down Taisho to the ground:

PRIVATE AND CONFIDENTIAL

Our Ref : MIB/83/9

18th January, 1985

The Manager,

Dear Sir,

Re: Transfer of Interest

Our circular dated 2nd October, 1984 regarding transfer of interest has caused some confusion amongst our members as well as the third party solicitors regarding the effective date of the resolution passed at the Extra-Ordinary General Meeting of the Bureau held on 30/8/1984.

We have already clarified the position to the BAR Council and we hope the Bar Council would advise their members accordingly. However, for the clarification of our own members, we would advise that the resolution passed on transfer of interest is not retrospective. The cut-off date is 30/8/1984. This means that it is the date of occurrence of the accident involving transfer of interest which would determine the liability of the Bureau and that of the insurance companies.

Kindly therefore note that claims in respect of accidents occurring before 30/8/1984 involving transfer of interest no matter when they are referred to the Bureau would continue to be dealt with by the Bureau while for any accidents occurring after 30/8/1984 involving transfer of interest the claims would become the liability of the insurance companies concerned. The members are therefore requested to abide by the above resolution and refer to the Bureau only those transfer of interest cases where accidents have occurred before 30/8/1984.

If you may need any further clarification please do not hesitate to write to us.

Yours truly,

Sgd (Illegible)
A.D. MAYER
Secretary

DISTRIBUTION: Member companies
c.c. Chairman, Council members.

Mr. N. Jegatheson, learned counsel for the plaintiff, conducted his case with some degree of care and prudence. He was quick on the uptake and he took the initiative to file an amended statement of claim marked as exh. "E" which was worded as follows:

> 14. Further and in alternative, the 1st Defendants are by virtue of being the insurer concerned within the meaning of the Motor Insurers Agreement liable to pay the Plaintiff the said judgment sum.

With this amendment, the plaintiff's position was quite secure. To answer the question posed, it makes not a whit of a difference if the ownership of the motorcycle AY 7181 X had been transferred from Tan to Ding (which was not the case here). This was my judgment and I so hold accordingly.

Fraud

As fraud was alleged by Taisho, the onus was therefore on them to prove fraud not on a balance of probabilities but rather beyond reasonable doubt (*Saminathan v. Pappa* [1981] 1 MLJ 121, 123 citing favourably *Narayanan v. Official Assignee, Rangoon AIR* [1941] PC 93). Taisho sought to argue through Madam Roha Mohamad Yusof that this court should draw an exception to the settled law that fraud must be proved beyond reasonable doubt and she argued that the plaintiff was the only one with the knowledge of the facts of the case and that Ding and Michel Tene Jean were untraceable. Indeed this was a submission devoid of merit. It must be emphasised that:

(1) the plaintiff was the injured victim;

(2) and Michel Tene Jean had lodged a police report admitting that he was the rider of motorcycle AY 7181 X;

(3) both Ding and Tan were Singaporeans, the latter a company director to boot with. Taisho could have made concerted attempts to search for them and put them in the witness box, yet this was not done.

and using these sets of facts, Madam Roha Mohamad Yusof was prepared to raise fraud as a defence against the plaintiff. In my judgment, these sets of facts do not establish fraud on the part of the plaintiff. On the contrary, these facts would support the plaintiff's case to the hilt. There was no necessity for the plaintiff to file his summons against Zainal and it was also immaterial that the plaintiff did not know the insurance particulars of motorcycle JAT 7499 ridden by Zainal. It was also immaterial that the plaintiff did not know the particulars of Zainal's solicitors. The refusal of the plaintiff to disclose the whereabouts of Zainal was also immaterial. Of significance to the plaintiff would be the judgment which he obtained in summons no: 63-16 of 1987 and

it is this judgment that he wants to enforce against both Taisho and the Bureau. In my judgment, Taisho being the insurer, at the material time, should be held accountable to the plaintiff. The letter from the Bureau dated 18 January 1985, which was reproduced somewhere in this judgment, would seal the fate of Taisho forever. By that letter Taisho agreed to be liable to third parties for motor accident claims that arose after 30 August 1984.

I will now proceed to ascertain the liability of the Bureau.

The memorandum of agreement was entered on 15 January 1968 between the Honourable Minister of Transport and the Bureau. The Bureau is a company incorporated under the Companies Act 1965 of which Taisho is a member. The Bureau is founded by the insurance companies who are members of it - that would be the Bureau's financial source. Under the memorandum of agreement made between the Honourable Minister of Transport and the Bureau, the Bureau agreed to be liable for all third party claims for personal injuries and death and damages arising therefrom in respect to and out of motor vehicle accidents in the event there was no insurance cover. The Bureau, in an attempt to shift liability and avoid paying to the plaintiff raised two pertinent defences.

The First Defence

The Bureau, at para. 5 of the statement of defence, alleged categorically that the plaintiff has failed to comply with cl. 6 of the memorandum of agreement which was said to be the conditions precedent to their liability. The plaintiff was quite magnanimous and admitted that he has to comply with the requirements of cl. 6 of the memorandum of agreement. That clause was worded thus:

> 6. THE following shall be conditions precedent to the liability of the Bureau, namely:-
>
> (a) That written notice of proceedings be given by registered post before commencement of such proceedings:-
>
> (i) to the Insurer in any case in which there was in force at the time the accident occurred a policy of insurance purporting to cover the use of the vehicle, the existence of which is known before the commencement of proceedings to the person bringing such proceedings (hereinafter called "the Plaintiff").
>
> (ii) to the Bureau in any other case.
>
> (b) That a copy of any Summons, Declaration or any statement of claim which may be issued shall be supplied to the Insurer or the Bureau, as the case may be, and that the Plaintiff shall not seek to obtain judgment before the expiry of thirty days from the date the copy of

such Summons, Declaration or statement of claim shall have been supplied to the Insurer or the Bureau, unless within the said period of thirty days the person against whom the Plaintiff has taken proceedings issues any process which would lead to the dismissal of such proceedings for want of prosecution.

(c) That if so required by the Bureau and subject to full indemnity from the Bureau as to reasonable costs the Plaintiff shall take all reasonable steps to obtain judgment against any person against whom he may have a remedy in respect of or arising out of the injury or death giving rise to the aforesaid proceedings.

(d) That the Plaintiff shall comply with all requirements of the Bureau in relation to any matter which might give rise to a claim against the Bureau in terms of this Agreement, provided that the Plaintiff shall not be bound by the terms of this paragraph unless the requirements of the Bureau are in all the circumstances reasonable. In the event of any dispute as to the reasonableness of any requirement, the decision of the Minister shall be final and binding on all parties concerned.

(e) That the judgment or judgments (including such judgments as may be obtained under paragraph (c) of this Clause) shall be ceded to the Bureau or its nominee.

(f) That the Plaintiff shall give credit to the Bureau for any amount paid to him by or on behalf of the Defendant in respect of any liability for injury to or death of any person, arising out of the event which occasioned the claim against the Bureau. In the event of such amount including a sum in respect of loss of or damage to property, the amount of which is not separately specified then the amount of the credit to the Bureau shall be in the same proportion as the amount of the claim for injury or death of any person bears to the total claim where such claims included an amount in respect of loss or damage to property.

Now, briefly by cl. 6(a) of the memorandum of agreement a written notice of the proceedings must be given by registered post before the commencement of the proceedings to:

(i) the insurer in which there was a policy in force purporting to cover the use of the vehicle; and

(ii) the Bureau in any other case.

By cl. 6(b) of the memorandum of agreement, a copy of the summons must also be issued and be supplied to the insurer or the Bureau, as the case may be. Mr. Sagadevan Thangavelu of counsel for the Bureau argued that both the

notices and the summons were not given to Taisho and the Bureau respectively and, consequently, the latters were not liable because the conditions precedent to their liabilities were not observed. Regrettably, there was an oversight on the part of counsel for the Bureau because he failed to take into account the averments in the statement of agreed facts where it categorically stated that the notices of the commencement of proceedings and the summons were issued to Taisho. It is interesting to note that the Bureau in their statement of defence categorically stated that Taisho was the insurer at the material time and it makes for interesting reading to reproduce that particular paragraph in the statement of defence:

> 4. The Second Defendant avers that the First Defendant was at risk at all material times and were the insurers concerned within the Memorandum of Agreement entered into between the Minister of Transport and the Second Defendant.

Paragraph 3 of the Bureau's statement of defence was equally apt. It was worded thus:

> 3. The Second Defendant contends and will contend that there was at all material times a valid policy of insurance issued by the First Defendant providing cover in respect of motor-cycle bearing registration no: AY 7181 X.

In so far as the case against Taisho was concerned, it was a "closed and shut case." The plaintiff had complied fully with cl. 6 of the memorandum of agreement. But the same cannot be said in regard to the Bureau. There was no evidence emanating from the plaintiff that the notice and the summons had been given and supplied to the Bureau.

My understanding of cl. 6(a)(ii) of the memorandum of agreement is this. That there is a necessity for the written notice of proceedings to be given by registered post before the commencement of the proceedings to the Bureau by the plaintiff. It imposes a duty on the part of the plaintiff to comply. From the available evidence there was a failure on the part of the plaintiff to comply with cl. 6(a)(ii) of the memorandum of agreement. This was my judgment and I so hold accordingly.

The Second Defence

An argument was advanced for the Bureau to the effect that by virtue of cl. 6(d) of the memorandum of agreement if the plaintiff was dissatisfied with the Bureau's decision he must appeal to the Minister and since the plaintiff has failed to comply with this clause his action was said to be misconceived.

A perusal of cl. 6(d) of the memorandum of agreement would provide the answer. That clause states, *inter alia*, that the plaintiff shall comply with all the requirements of the Bureau. And if the requirements were not reasonable he should appeal to the Minister for a decision on the reasonableness of the requirements. But sad to say in the context of the present case, the Bureau did not impose any requirements for the plaintiff to comply with. By letter dated 5 October 1989, the Bureau merely advised the plaintiff that the insurer, namely Taisho, was liable and not the Bureau. That letter is now reproduced to show the Bureau's stand on the matter:

MOTOR INSURERS' BUREAU OF WEST MALAYSIA

Telephone: 2747395/6/7/8/9
Cables: PERINSURAN KUALA LUMPUR

Registered Office:
3rd Floor, Wisma PIAM,
150, Jalan Tun Sambanthan,
50470 Kuala Lumpur.
Postal Address:
P.O. Box 12555.
50782 Kuala Lumpur.

Our Ref : MIB/B1/2
Your Ref: NJ/8136/84/sjl

5th October, 1989

M/s John Ang & Jega,
Suite 1401 & 1409, 14th Floor,
Johor Tower, Jln. Gereja,
P.O. Box 244,
80730 JOHOR BAHRU.

Dear Sirs,

Re: Accident on 11.9.1984 at Batu 3,
Jalan Scudai, J.B. Johore involving
m/cycle JAT 7499 & m/cycle AY 7181 X
Johor Bahru Magistrate's Court
S/No: 63-16-87 (E)

Your letter of 29th September, 1989 and the enclosures refer.

Motorcycle AY 7181 X **was insured** at the material time of accident. As such, the Insurer should thus deal with the claim and/or be liable for the Judgment sum.

The MIB of West Malaysia is not involved at all in this case.

Yours faithfully,
By Order of the Council

Sgd (Illegible)
Asst. Secretary

N/rm.

In my judgment, this very letter was clearly a damning piece of evidence that showed that the Bureau did not at any time impose any requirements on the plaintiff so as to enable him to appeal to the Minister.

That is not the end of the matter. The Bureau argued that the plaintiff who was not a party to the memorandum of agreement had no *locus standi* to sue the Bureau. But alas, this very defence was not pleaded in the Bureau's statement of defence nor was there an attempt to amend the statement of defence so as to incorporate the issue of *locus standi*. English judges are more practical. They would reject outright an argument of this nature. Lord Denning sounded a stern warning in *Hardy v. Motor Insurers' Bureau* [1964] 2 QB 745:

> This was, on the face of it, a contract between two parties for the benefit of a third person. No point is taken by the Motor Insurers' Bureau that it is not enforceable by the third person. I trust that no such point will ever be taken.

James LJ in *Persson v. London Country Buses* [1974] 1 WLR 569 said:

> One point taken, inadvertently, we think, before the judge, but not taken before this court, on behalf of the bureau was that the plaintiff was not a party to the contract on which he sought to rely. It is in accordance with the publicly declared policy of the bureau that the bureau does not rely on the absence of privity of contract, and that policy has been fully adhered to before us.

It is interesting to note that the Bureau in *Persson v. London Country Buses [supra]* initially adopted the position that the applicant could not sue them because the applicant was not a party to the agreement, but fortunately the Bureau abandoned the point when the case went up to the Court of Appeal.

In Malaysia by virtue of s. 80 of the RTO an exception is made to the doctrine of privity of contract which enables a third party to a contract to sue on it even though he is not a party to it. Another exception would be the memorandum of agreement in this particular case and the reasons for this would be as follows:

(a) When the Minister of Transport entered into the memorandum of agreement with the Bureau (it must not be forgotten that the Bureau is a company formed specifically to take care of the claims of third parties against uninsured vehicles) it was done solely for and on behalf of all the third parties who obtained judgment against any person in respect of liability which is required to be covered by the RTO.

(b) Pure and simple the Minister of Transport is the agent or servant of the people, in the context of the present case the third parties, and consequently any contract entered into by the Minister, as an agent or servant of the people, would bind the principals - namely, the third parties and the Bureau.

(c) It is clear as daylight that upon reading the memorandum of agreement its primary object is simply to give a third party who comes within the purview of the memorandum of agreement a direct cause of action.

Conclusions

Choo Kwun Kiat ('Choo') testified for the first defendant. Choo claimed to be the legal adviser to the first defendant and he tendered a letter of authority authorising him to represent the first defendant in a court of law. His speciality is in motor insurance claim and he has been practising law in Singapore since 1980. But his evidence in court was centred principally on the file of the case. Thus, he testified that initially motorcycle AY 7181 X was registered in the name of Tan but subsequant searches with the ROV revealed that, at the material time of the accident, the motorcycle was registered in the name of Ding. This was also echoed and repeated by Choo when he was being cross-examined. Under cross-examination, Choo elaborated further and this time he admitted that the three searches conducted at the ROV revealed the insurer of motorcycle AY 7181 X to be the first defendant. Choo adverted to the appointment of an investigator to investigate the case but when pressed by Mr. N. Jegatheson to produce the report of the investigator Choo remained momentarily speechless and he feebly sought to explain that he was not given the report by the investigator nor was the said report given to him by the first defendant. Seen in its correct perspective, the evidence of Choo was beneficial to the plaintiff. Choo agreed that the official records of Singapore government departments are fairly kept well and this would surely support the judicial notice that was adverted to at length in the early part of this judgment. Choo too agreed that in Singapore one cannot register a vehicle without an insurance policy and this meant that since Ding was the registered owner of motorcycle AY 7181 X at the material time, he too was covered by an insurance policy and that the insurer was none other than the first defendant. Choo was quite honest when he said that if the first defendant wanted to

withhold material from him, they could do so. Of pertinence would be the assertions by Choo that the first defendant did not lodge police reports in regard to two matters. Firstly, there was no police report to say that Ding appears to have registered the motorcycle AY 7181 X in his name and, secondly, no police report was also lodged to show that motorcycle AY 7181 X appears to be insured by Taisho whereas in fact there was no such insurance coverage. The strain of cross-examination must have been too much for Choo to bear because finally he relented and he categorically said:

> Yes, I now say that the first defendant is liable to the plaintiff since the former was the insurer of motorcycle AY 7181 X. Judgment should be given to the plaintiff against the first defendant.

It would be a correct assessment of Choo's evidence to say that the quality of his evidence was detrimental to Taisho. Choo was the author of Taisho's civil liability. His evidence clearly lends credence to the plaintiff's case.

In his statement of claim, the plaintiff seeks his remedy against the Bureau by way of an alternative. The plaintiff in the main seeks to enforce the judgment against Taisho and it is Taisho that the plaintiff is gunning after. The evidence against Taisho is overwhelming. The statement of agreed facts established once and for all that at the material time Taisho was the insurer and the registered owner being Ding. Even the Bureau in their defence pointed an accusing finger at Taisho. That being the case, it was my judgment and I so hold that Taisho should be liable to satisfy the judgment which the plaintiff sought to enforce. Judgment should be entered agianst Taisho in the sum of RM19,609 with costs. And in line and in accord with prayer (iii) of the statement of claim, costs of this action to be taxed. I must not forget para. 11 of the statement of claim and effect must be given to it. This meant that Taisho must satisfy the judgment with interest at 8% per annum from 3 January 1989 to the date of realisation.

The plaintiff is a lucky individual. His case against Taisho is assured of success right from the very beginning. Had there not been in existence an insurer in the form of Taisho, the Bureau too would be liable to satisfy the judgment obtained by the plaintiff provided the conditions precedent in clause 6 of the memorandum of agreement have been complied with. I am prepared to say and I so say without reservations that the Bureau is a "godfather" who must step in by virtue of the memorandum of agreement to pay the victim of a road accident whenever the victim cannot recover from the insurance company. Road accident victims who have obtained judgments and who seek to enforce those judgments must comply fully with cl. 6 of the memorandum of agreement before the Bureau could fork out payments to them. In such a situation, the Bureau is obliged to pay those victims in respect of any liability

for injury or death, arising out of the event which gave rise to the claim against the Bureau. Seen in this context, the Bureau is a charitable organisation whose sole existence is to help road accident victims where the culprits are men of straws. That would be social justice in the form of social insurance that would ensure compensation to an innocent victim. It is pointless to have in our midst the memorandum of agreement if the court is not prepared to give effect to it. In *Randall v. Motor Insurers' Bureau* [1968] 1 WLR 1900, the plaintiff there succeeded in satisfying his judgment against the Bureau there. The facts of which may be stated as follows. The plaintiff, wishing to deter a lorry driver from leaving a private site, stood in front of the lorry, which was stationary, on the site near an entrance to a public road. The lorry was driven at the plaintiff who jumped aside but was hit by a wing and trapped between the moving lorry and the escarpment of a raised bank on the site. As the lorry passed him he was pulled forward, rather suddenly, and fell to the ground, and the rear wheel passed over his leg when the greater part of the lorry was on the road and the front wheels were well out into it, turning left, and the lorry drove off. Judgment in an action, for damages for negligence causing personal injuries, by the plaintiff against the driver, was unsatisfied, and the plaintiff brought an action against the motor insurers' Bureau to satisfy the judgment. It was held that, in common sense and in the ordinary use of language, the lorry was being used on a road at the time when the plaintiff sustained the injury and that the incident could not be divided into separate incidents and the determining factor was the time when the wheel ran over the leg and that, accordingly, the plaintiff was entitled to recover from the Bureau.

Megaw J in a short judgment had this to say at p. 1904 of the report:

> In these circumstances, it has been agreed between the plaintiff and the defendants that the plaintiff may bring this action against the defendants without the driver's insurers being brought into it.

His Lordship then continued at pp. 1905 to 1906 of the report:

> It is not suggested on behalf of the plaintiff that the driveway in the school's property was a road. It is not suggested on behalf of the defendants that Hillsborough Road, including the pedestrian pavement, was not a road. There is no dispute that the driver incurred liability to the plaintiff in respect of bodily injury. The one and only question in dispute is: was it bodily injury caused by, or arising out of, the use of the Dodge lorry on a road?
>
> In my judgment, the answer to that question on the facts of this case is "yes." I have no doubt that in common sense and in the ordinary use of language the lorry was being used on a road - Hillsborough Road - at the time when the plaintiff sustained the serious injury of which he complains. If anything

> turns on the precise time of the incident, which, again as a matter of common sense, cannot be divided into a series of separate incidents, the determining factor is the time when the wheel of the lorry ran over the plaintiff's leg. At that time the greater part of the lorry was on the road, and the lorry as a whole was using the road. The fact that the rear part of the lorry including the wheel which ran over the plaintiff's leg, was still, just, on private property does not, in my view, affect the conclusion that the lorry was then using the road. It was the use of the lorry on the road - the fact that it was being driven further on to the road in order to drive away along the road - which caused the injury. Certainly the injury arose out of the use of the lorry on the road. The fact that the plaintiff, when he was injured, was still - though only just - on private property and that the wheel which caused the injury was still just on private property does not, to my mind, affect the conclusion. The plaintiff therefore succeeds in his claim.

There was no technical objection advanced by the Bureau in the Randall's case like what is happening in the present case and it was not a surprise that the plaintiff there succeeded against the Bureau.

Persson v. London Country Buses And Another [1974] 1 WLR 569 concerned a bus conductor that was injured by the bus stopping suddenly. The bus company denied liability and maintained that the accident was due solely to the fault of the untraced car driver. The application to the Bureau for compensation was rejected on the ground that the untraced person would not be liable. The court had to consider the question of whether the conductor was entitled to bring an action against the Bureau alleging wrongful failure to compensate. The registrar of the county court summarily dismissed the plaintiff's claim and on appeal, the circuit judge upheld the registrar's decision. On further appeal to the English Court of Appeal, the plaintiff was also defeated. James LJ delivering the judgment of the Court of Appeal had this to say (see pp. 573 to 575 of the report):

> For the bureau, Mr. Gibson argues that the agreement is enforceable by the Minister and (by consent of the bureau) by an "applicant," but only in accordance with the terms of the agreement. The proper construction of the agreement is that the bureau undertakes to act in relation to applications in a stated way (clause 7) and undertakes to make an award in favour of and to pay sum awarded to applicant when either (1) the decision of the bureau is to do so or (2) the arbitrator, on an appeal by the applicant under clause 11, decides that an award shall be made (clause 20). It is common ground that the bureau must act in good faith and there is no suggestion that they have done otherwise in this matter.
>
> Mr. Gibson's argument relates principally to the construction of cll. 1, 3 and 7 of the agreement. He argues that the obligation to make an award under cl. 3 in favour of an applicant is expressly made subject to the provisions of the following clauses, including cl. 7; that cl. 7 prescribes precisely what the

bureau shall do in respect of any application received and that under cl. 7 the bureau have the duty to make a decision as to whether to make an award; that if in performance of their obligations under cl. 7 the bureau decide that the case is one which does not satisfy one or more of the conditions (a) to (f) in cl. 1(1) there is no obligation to make an award because the case is not one to which the agreement applies and the application must be rejected.

Mr. Gibson cites *Cipriani v. Burnett* [1933] AC 83 in support of his proposition that where the parties to a contract have agreed in language which clearly shows who is to decide certain facts then no right of action in the courts is vested in the contracting parties until the facts have been decided according to the contract. Lord Macmillan said, at pp. 88-89:

> It is not essential in order to exclude a right of action at law that the contract should in terms prescribe that the award of the specially constituted tribunal shall be a condition precedent of any legal proceedings. In *Scott v. Avery* [1856] 5 H.L. Cas. 811 the contract so prescribed, and the action was held not to be maintainable in the absence of an award, but Lord Campbell in his speech [at app. 854-855] referred to *Brown v. Overbury* [1856] 11 Exch. 715, 716, 717 as being identical in principle, and in the latter case, where the court refused to entertain a claim for the prize in a sweepstake on a horse race, in the absence of a decision by the stewards as to the winner, the clause in the rules of the race provided no more, according to the report, than that any dispute as to the race was to be decided by the award of four stewards.'

Then Lord Macmillan quoted from *Brown v. Overbury*, 11 Exch. 715 the words of Alderson B., at pp. 716-717:

> 'Every contract must be determined according to the circumstances belonging to it. This is one of racing, and the universal practice has been, that, in order to ascertain who is to have the stakes, it must first be determined who is the winner, not in the opinion of a jury, but of the persons appointed to decide it, *viz*. the judge or the stewards.'

and of Martin B., at pp. 717-718:

> The judgment of the stewards in the case of a horse race must necessarily be conclusive; they are expressly appointed to decide the matter, and there is no appeal from them. It is a condition precedent to the plaintiff's right to recover, that he obtain the judgment of the stewards ....

In our judgment the circuit judge was right in his decision in the present case. He held, according to counsel's note of his judgment:

> Clause 3 is subject to clause 7. It makes it perfectly clear that on the basis of the report the M.I.B. shall decide whether to make an award. There are no grounds on which the bureau is in breach of the agreement.

> The proper construction of the agreement we find to be that contended for by Mr. Gibson, and we are unable to accede to the argument of Mr. Fawcett that clause 7 is purely procedural in effect. We emphasise that it is only by virtue of the terms of the agreement that any payment at all can be obtained from the bureau.

Finally, his Lordship wrapped up the whole case in these salient words (see the final two paragraphs of the report):

> In our judgment the obligation under clause 3 of the agreement to make an award is subject to the provisions of clause 7, and the decision as to whether the case is one which the agreement applies as defined by clause 1(1) is one for the bureau to make. If an applicant is dissatisfied with that decision he has the right of appeal provided by the agreement. He cannot bring an action, as the plaintiff seeks to do. alleging a breach of the agreement on a basis of fact which is reserved by the agreement for the decision of the bureau in accordance with the terms of the contract.
>
> The appeal is dismissed.

Persson's case too can be distinguished from our present case. Here the rider of motorcycle AY 7181 X was known and so was the insurer. Here the case against the Bureau was made weaker by the failure of the plaintiff to comply with cl. 6 of the memorandum of agreement. Had the plaintiff complied fully with that clause he would have obtained judgment against the Bureau. But this was not the case. In the premises, the plaintiff's claim against the Bureau must be dismissed without costs. It was obvious that the plaintiff's failure was entirely based on a technicality.